

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SECRET FILE COPY ORIGINAL RECEIVED

AUG 4 2000

In the Matter of)	
)	
Toll Free Service Access Codes)	CC Docket No. 95-155
)	
Database Services Management, Inc.)	NSD File No. L-99-87
Petition for Declaratory Ruling)	
)	
Beehive Telephone Company)	NSD File No. L-99-88
Petition for Declaratory Ruling)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION OF WORLDCOM, INC.

Introduction

WorldCom, Inc. ("WorldCom") submits this Petition for Reconsideration of the Commission's *Fifth Report and Order* ("Order") in the above-captioned matter (released July 5, 2000). More than two and one-half years have passed since the Commission "conclude[d] that, as presently structured, toll free number database administration is inconsistent with section 251(e)(1) of the Communications Act."¹ Since then, the legally deficient structure of toll free administration has undergone no significant changes. Nevertheless, the Commission has once again referred the question of toll free administration to its Federal Advisory Committee, the North American Numbering Council ("NANC"). There is no justification given in the *Order* to delay yet again resolution of the issues raised in this docket. The existing system for administration of toll free telephone numbers has been illegal for more than four years. It is in this light that WorldCom urges the Commission to reconsider several of its conclusions in the

No. of Copies rec'd
List ABCDE

014

Order, and to ask the NANC to recommend a plan for transition of toll free administration to an impartial, third-party administrator that does not depend on a small group of carriers for its existence.

Argument

I. The Commission should reconsider its conclusion that DSMI is an impartial administrator.

In the *Order* the Commission essentially concluded that Database Service Management, Inc. (“DSMI”) acts as an impartial administrator because the terms of the SMS/800 Tariff require impartial administration.² The Commission should reconsider this remarkable *non sequitur* for at least three reasons. First, the fact that the SMS/800 tariff defines the terms and conditions under which Responsible Organizations (“RespOrgs”) obtain access to the database is irrelevant to an evaluation of DSMI’s impartiality. In other words, while the tariff may facially attempt to shield RespOrgs from discrimination, it does not change the fact that DSMI is the creature of a small set of companies – the largest incumbent local exchange carriers – that, in general terms, share a common view of their business opportunities and priorities. In fact, in reaching its conclusion that DSMI is impartial, the Commission misapplied its own neutrality test by essentially ignoring the express finding that DSMI’s income is primarily received from its relationship with certain telecommunication service providers.

Second, the tariff does not describe, and arguably may not govern, every possible interaction that DSMI may have with RespOrgs and the industry. Since DSMI’s duties

¹ In the Matter of Toll Free Service Access Codes, CC Docket No. 95-155, *Third Report and Order* (rel. Oct. 9, 1997), ¶109.

² *Order* at ¶ 25.

are not purely ministerial, the SMS/800 tariff does not moot the question of DSMI's impartiality.

Finally, in deciding that DSMI is an impartial administrator, the Commission appears to have reversed its previous conclusion that the current system of toll free administration is inconsistent with section 251(e)(1). Yet the *Order* provides no reason for departing from the previous conclusion.³ No party has made any new argument. Nor have any material facts changed. The Commission's previous conclusion – that toll free numbering administration, as currently structured, violates section 251(e)(1) – remains sound. Since the Commission has not adequately explained this reversal, it cannot be sustained on this basis alone.

A. The Commission misapplied the relevant neutrality criteria.

In assessing DSMI's impartiality, the *Order* purports to apply the neutrality criteria set forth in 47 C.F.R. § 52.12. What the *Order* has really done is to turn those criteria on their head. Despite finding that DSMI is completely dependent on the Bell Operating Companies ("BOCs") for its income, if not its very existence, the *Order* concludes that DSMI is not subject to the undue influence of the BOCs. To reach this conclusion, the Commission adopts an argument (first made by the BOCs themselves) that simply is not supported by the very conclusions that the Commission reached.

The neutrality criteria provide that: (1) the administrator may not be an affiliate of any telecommunications services provider(s); (2) the administrator may not issue a majority of its debt to nor derive a majority of its revenues from any telecommunications services provider; and (3) notwithstanding the criteria in (1) and (2), the administrator

³ Administrative agencies must clearly set forth the reasons for reversing policy determinations. See, *Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-808 (1967).

may be determined to be or not to be subject to undue influence by parties with a vested interest in the outcome of numbering administration activities.⁴ As the Commission itself observed, “[t]he first two criteria are objective, quantifiable measures intended to prevent the administration from maintaining financial relationships with telecommunications service providers that could exert control over the decisions and activities of the administrator or otherwise compromise its impartiality.”⁵ Here, the Commission found that:

DSMI’s income is primarily received from its relationship with the SMT [Service Management Team], which is comprised entirely of BOCs. Although the BOCs are separated entities, we find that their interests are sufficiently aligned that they may be deemed collectively to be a telecommunication provider. Thus, the requirements of Criterion Two are not satisfied.⁶

However, the Commission then remarkably concluded that while DSMI does not meet the second criterion because its income is primarily received from its relationship with the SMT, it nonetheless is not subject to undue influence by the BOCs. According to the Commission:

We find, rather, that the terms in the SMS/800 Tariff require the impartial administration of toll free numbers. Thus, the terms of the SMS/800 tariff also preclude the BOCs from exercising undue influence over DSMI which, in any event, exercises no discretion in the administration of toll free numbers.⁷

This conclusion is wrong based on the law, the facts of this case and a proper application of the neutrality criteria.

WorldCom notes at the outset that the tariff cannot cure a neutrality issue. The timetable for tariff review is compressed. Aggrieved parties must therefore enforce the

⁴ 47 C.F.R. § 52.12(a)(1)-(3).

⁵ *Order* at ¶ 17 (emphasis added).

⁶ *Id.* at ¶ 22.

tariff through complaints, which generally take years to resolve. Moreover, the BOCs are able to establish the tariff's provisions in a manner that can make enforcement of little value.⁸ Indeed, that is why Congress mandated impartial administration – to establish incentives for fair dealing from the start. That is also what the neutrality criteria seek to protect.

The Commission's application of the neutrality criteria in this case establishes that, as a matter of law, DSMI cannot be deemed an impartial administrator. In finding that DSMI is an impartial administrator, the Commission essentially ignored its own express finding that DSMI's income is primarily received from its relationship with the BOCs. However, this objective criterion cannot be dismissed so lightly. By the Commission's own words, this criterion was intended to prevent an administrator from having a financial relationship with telecommunication service providers that could "compromise its impartiality."⁹ That is precisely the case here, and the Commission cannot use the third prong of the test to trump this finding.¹⁰ Indeed, if this were true, then the first two objective criteria would be rendered virtually meaningless. Therefore, the Commission's conclusion cannot survive its express finding that DSMI is dependent on the BOCs for its income.

⁷ *Id.* at ¶ 25.

⁸ For example, the *Order* mistakenly suggests that parties can seek redress of concerns regarding database performance through the complaint process (¶ 27). In fact, the BOCs have consistently refused to include performance guarantees in the SMS/800 Tariff. There is virtually nothing to enforce.

⁹ *Order* at ¶ 17.

¹⁰ If applied properly, the third criterion might give the Commission relatively broad discretion to find undue influence in the absence of a violation of the other criteria, and narrower discretion to find the absence of undue influence despite a violation of one of the objective criteria. *See, e.g.,* In the Matter of Administration of the North American Numbering Plan, CC Docket No. 92-237, *Third Report and Order* (rel. Oct. 9, 1997), ¶ 81 (finding that the third criterion may allow the Commission to overlook a *de minimis* violation of the objective criteria, but if the violation were greater than *de minimis*, the Commission would have to reconsider its decision).

B. The SMS/800 tariff does not ensure DSMI's impartiality.

While the SMS/800 Tariff defines the terms and conditions under which RespOrgs reserve toll free numbers, it does not strictly define every action, formal and informal, that may be undertaken by DSMI. The following examples highlight a few important functions that are not fully addressed by the tariff and show why it cannot be used as a basis to conclude that DSMI is an impartial administrator.

First, in the day-to-day course of business, DSMI may receive many requests from individual RespOrgs for assistance in resolving performance and other issues related to the toll free database. The tariff does not strictly govern DSMI's responses to such requests, but they form an important part of DSMI's duties, particularly when, as now, the database's performance is degraded.

Second, DSMI also acts as a point of contact to the industry at-large. The SNAC will typically bring any concerns or issues to the attention of DSMI, which will in turn raise those issues with the BOCs. The SMS/800 Tariff does not spell out the precise actions that DSMI will take in response to any particular issue raised by the SNAC.

Third, DSMI's interactions with one industry segment, the BOCs, are governed not only by the SMS/800 Tariff, but also by the ongoing contractual relationship between DSMI and the BOCs. Other industry members are largely ignorant of the terms of this relationship, since the BOCs have never shared its details with the rest of the industry.

In all these instances, DSMI may, or may not, act in response to communications from individual RespOrgs, the industry as a whole, or the BOCs. But in every case DSMI's action or inaction is almost completely hidden from the industry. There is no way to know whether or not DSMI acts impartially in these situations, since there is no

way to monitor its actions. Since so much of what DSMI does is neither strictly defined by the SMS/800 Tariff, nor open to observation by the rest of the industry, the conclusion that the tariff guarantees DSMI's impartiality must fail. DSMI may or may not undertake many actions that are not strictly governed by the tariff. Moreover, there is no way to know whether in so doing DSMI acts impartially.

C. The Commission has not articulated any valid reason to depart from its prior conclusion that the existing system of toll free administration is inconsistent with section 251(e)(1).

In its *Third Report and Order*, the Commission concluded that the existing system of toll free administration was inconsistent with section 251(e)(1) of the Communications Act. Although no material fact has changed, the Commission now appears to have reconsidered and reversed that conclusion. The *Order* does not articulate a valid reason for reversing the Commission's prior conclusion. Since the Commission has not adequately explain this reversal, it cannot be sustained.

The Commission appears to have seriously misconstrued the nature of its prior conclusion, as well as the reasoning that necessarily supported that conclusion. In the *Fifth Report and Order*, the Commission states that:

[t]he Commission's previous determination that the administration of the toll free database by DSMI was inconsistent with the impartiality requirement in section 251(e) was based on the relationship between the BOC-owned Bellcore (parent) and DSMI (subsidiary). The Commission did not, at that time, determine whether DSMI would be subject to undue influence under the third criterion of the neutrality test. Rather than disqualify DSMI simply because of its relationship with the BOCs, however, we think the better approach is to evaluate DSMI's neutrality under all three neutrality criteria.¹¹

This statement is wrong in two respects. First, the Commission's previous determination was broader than the statement implies. In the *Third Report and Order*, the Commission

“conclude[d] that, as presently structured, toll free number database administration is inconsistent with section 251(e)(1).”¹² This conclusion applies not only to DSMI, but also to the entire structure of toll free administration, including the role of the BOCs. In comments leading up to that conclusion, parties clearly asserted that it was the entire structure of toll free administration that needed repair.¹³ In response to those comments, the Commission rightly concluded not only that DSMI failed the impartiality requirement, but that the entire structure of the system violated the Act.

Second, the implication that the Commission previously failed to consider and reject arguments that DSMI was not subject to the BOCs’ undue influence, is plainly wrong. The substance of this argument was clearly before the Commission when it reached its conclusion in the *Third Report and Order*. The BOCs themselves made the argument, which the Commission necessarily rejected in reaching its conclusion.

In Joint Comments filed together with Bellcore, the BOCs argued that:

[t]he tariffing requirement ensures that toll free numbers are administered in an impartial way: The [BOCs] provide the Resp Orgs with access to the SMS/800 database on non-discriminatory terms and conditions, and the individual Resp Orgs select toll free numbers on a first-come, first-served basis. Since the Resp Orgs obtain nondiscriminatory, direct electronic access to the national database, they are able to reserve numbers themselves without the intervention of any other entity and without fear of favoritism. Section 251(e)’s requirements are thus satisfied.¹⁴

Notwithstanding this argument, the Commission concluded that in fact section 251(e)’s requirements were not satisfied. Thus, the Commission necessarily rejected the very argument that it has now accepted – that the SMS/800 Tariff ensures DSMI’s neutrality. The Commission has articulated no reason for departing from its prior conclusion that the

¹¹ *Order* at ¶ 18.

¹² ¶ 109.

¹³ *See, e.g., Sprint Comments* at 1-2.

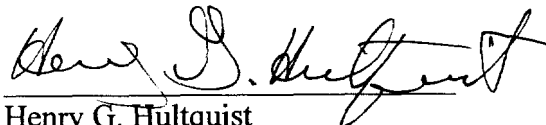
tariff does not ensure DSMI's neutrality. As demonstrated above, its 1997 conclusion remains valid.

Conclusion

For the reasons stated above, the Commission must reconsider its conclusion that DSMI is an impartial administrator of the toll free database. WorldCom urges the Commission to reverse that conclusion and ask the NANC to recommend a plan for the transition of toll free number administration to neutral third parties that have no ties, either of ownership or by contract, to individual industry members or segments.

Respectfully submitted,

WorldCom, Inc.



Henry G. Hultquist
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202)887-2502

August 4, 2000

¹⁴ Joint Comments of the Bell Operating Companies and Bellcore at 5.

CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that copies of the foregoing In the Matter of Toll Free Services Management, Inc. Petition for Declaratory Ruling, Beehive Telephone Company Petition for Declaratory Ruling of WorldCom. Inc. were sent via first class mail, postage paid, to the following on the 4th day of August 2000.

Yog Varma
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Charles Keller
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Diane Harmon
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Marty Schwimmer
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Cheryl Callahan
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

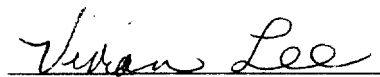
Les Selzer
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

International Translation Services
1231 20th Street, NW
Washington, DC 20036

Russell D. Lukas
Lukas, Nace, Gutierrez & Sachs
1111 19th Street, NW, Suite 1200
Washington, DC 20036

Database Service Management
Louise L.M. Tucker
2020 K Street, NW
Washington, 20006

*HAND DELIVERED


Vivian Lee